Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149

PETITION FOR RECONSIDERATION

I. THE COMMISSION SHOULD RULE THAT THE BOCS MAY PROVIDE OUT-OF-REGION INTERLATA INFORMATION SERVICES WITHOUT USING A SEPARATE AFFILIATE.

In the Report and Order, the Federal Communications Commission ("Commission") determined that Section 272(a)(2)(B)(ii) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, does not exclude out-of-region, interLATA information services from the separate-affiliate requirements of Section 272.[1] As we will explain below, this interpretation – though perhaps permissible – is not required and is not the most reasonable reading of this provision. The Commission should reverse that determination and rule that the Bell Operating Companies ("BOC") may provide out-of-region interLATA information services subject only to the separation requirements the Commission has imposed on the provision of out-of-region interLATA telecommunications services.

[1] See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (Dec. 24, 1996) ¶¶ 85-86 ("Report and Order").

Section 272(a)(2) sets forth the services subject to the separate-affiliate requirement –

> The services for which a separate affiliate is required . . . are:
>
> (A) Manufacturing activities (as defined in Section 273(h)).
>
> (B) Origination of interLATA telecommunications services, other than—
>
> (i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of Section 271(g);
>
> (ii) out-of-region services described in Section 271(b)(2); or
>
> (iii) previously authorized activities described in Section 271(f).
>
> (C) InterLATA information services, other than electronic publishing (as defined in Section 274(h)) and alarm monitoring services (as defined in section 275(e)).[2]

The Commission ruled that subsection (B) applies only to interLATA telecommunications services, so that the exemption of "out-of-region services" in subsection (B)(ii) also applies only to out-of-region telecommunications services. Subsection (C), which expressly requires a separate affiliate for interLATA information services, does not differentiate between in-region and out-of-region services. The Commission thus determined that out-of-region information services are included within subsection (C), but not within the exclusion of subsection (B)(ii). As a result, the BOCs' out-of-region information services would be subject to the separate-affiliate requirements of Section 272.

[2] 47 U.S.C. §272 (a)(2).

Though this is a plausible reading of the statute, we do not believe it is what Congress intended. The principal flaw in the Commission's analysis is its assumption that the introductory words to subsection (B) define the scope of the exclusions in subsections (B)(i), (ii) and (iii). That is, because the introductory words require a separate affiliate for a BOC's "origination of interLATA telecommunications services," the Commission determined that the exclusions from that requirement must also be limited to telecommunications services.

But subsection (B)(i) demonstrates the error of that determination. That provision exempts certain services from the separate-affiliate requirement, including the "incidental" services described in Section 271(g)(1) and (2). The first of these provisions permits the BOCs to provide, prior to Section 271 certification, audio and video programming services to their subscribers, including –

> the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services.[3]

One could argue whether audio and video programming constitute information services, but the interactive capability described in this subsection clearly meets the definition.[4]

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[3] 47 U.S.C. §271(g)(1)(B).

[4] "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. §153(20).

Section 271(g)(1)(D) also permits the BOCs to provide interLATA alarm monitoring, plainly an information service.[5] Similarly, Section 271(g)(2) permits the BOCs to provide interLATA "two-way interactive video services or Internet services" to elementary and secondary schools. Two-way interactive video services are information services; many Internet services (as distinguished from Internet access) are also information services.

Plainly, the reference to "incidental interLATA services" in Section 272(a)(2)(B)(i) includes both telecommunications services and information services. Given that, the most reasonable reading of Section 272(a)(2)(B)(ii) is that its reference to "out-of-region services" likewise includes both telecommunications services and information services. The absence of an exclusion for out-of-region information services in Section 272(a)(2)(C) becomes meaningless, given the specific inclusion of other types of information services among the exclusions of Section 272(a)(2)(B).

Accepting the Commission's interpretation of Section 272(a)(2)(B)(ii) requires a belief that Congress intended to impose a separate-affiliate requirement on the BOCs' out-of-region provision of interLATA information services, even though it expressly exempted out-of-region interLATA telecommunications services from that requirement. Yet we have no indication from any source that Congress considered the BOCs' provision of out-of-region interLATA information services to be somehow a greater threat to competition. Indeed, one would more logically reach the opposite

[5] Section 275 delays the entry of some BOCs into the alarm monitoring services market (both intra- and interLATA).

conclusion, given that the 1996 Act gives the BOCs much more latitude to provide several interLATA information services, both in- and out-of-region.

Absent a reason to subject out-of-region interLATA information services to greater separation than the Commission requires for the non-dominant treatment of out-of-region interLATA telecommunications services[6] – and we are aware of none – the Commission should change its prior determination and rule that out-of-region interLATA information services are not subject to the separate-affiliate requirements of Section 272.

II. THE JOINT MARKETING RESTRICTION OF SECTION 271(e)(1) SHOULD APPLY TO POST-SUBSCRIPTION MARKETING ACTIVITIES, INCLUDING THE BUNDLING OF INTERLATA AND RESOLD LOCAL EXCHANGE SERVICES.

Section 271(e)(1) of the Communications Act prohibits, for a limited period of time, certain interexchange carriers from jointly marketing their interLATA service with the resold local exchange service of a BOC. In the Report and Order, the Commission determined that this prohibition applies only to activities that occur "prior to the customer's decision to subscribe."[7]

Specifically, the Commission determined that once a customer has subscribed to an affected carrier's interLATA service and its resold local exchange service,

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[6] See In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, Report and Order, FCC 96-288 (July 1, 1996).

[7] Note 1, supra, Report and Order ¶281.

"that carrier may market new services to an existing customer."[8] It did not define what a "new" service is in this context.

To avoid confusion, the Commission should clarify that a "new" service must be more than just a packaged offering of interLATA service and resold exchange service offered at a discount. Otherwise, the restriction in Section 271(e)(1) will become meaningless.

With this provision, Congress plainly intended to prevent the affected interexchange carriers from gaining too great a competitive advantage over the BOCs during the period when the BOCs are precluded from offering in-region interLATA services and thus unable to offer a bundled offering of interLATA service and local exchange service. But if the affected carriers can make such an offering after a customer has subscribed to their services, the prohibition becomes meaningless. It takes no great creativity to imagine sales campaigns a carrier might utilize to inform the populace that, if only they will subscribe to the carrier's local service and its interLATA service, discounts will shortly follow.[9]

If this prohibition is to have any meaning, the Commission must clarify that the affected carriers may not market discounted packages including their

[8] Id.

[9] For example, a carrier might pitch an advertisement to its existing interLATA customers offering promotional discounts on its resold local service. Once the customer signs up for both, they become eligible for a permanent packaged discount.

interLATA service and resold local exchange service, whether before or after a customer has subscribed to their services.

Respectfully submitted,

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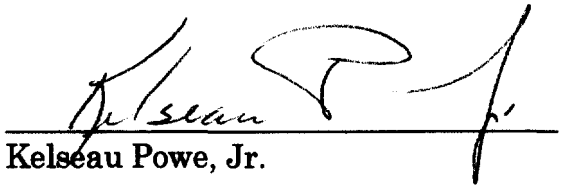
February 20, 1997

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 20th day of February, 1997, I have caused a copy of the foregoing **PETITION FOR RECONSIDERATION** to be served via hand-delivery upon the persons listed on the attached service list.



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